Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1749

In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLEES STATE OF MISSISSIPPI AND MISSISSIPPI PUBLIC SERVICE COMMISSION

ALEX A. ALSTON, JR.
(Counsel of Record for the Mississippi Public Service Commission)
JAMES T. McCAFFERTY, III
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
(601) 948-6882

HIRAM EASTLAND
(Counsel of Record for the State of Mississippi)
EASTLAND LAW OFFICES
600 East Amite Street
Suite 100
Jackson, Mississippi 39202
(601) 948-7545
Drawer 26
Doddsville, Mississippi 39736
(601) 756-4898

(Other Counsel on Inside Cover)

R. L. MERSEREAU, INC., 923 Cherry Street, Kansas City, Mo. 64106, (816) 421-3939

HUBBARD T. SAUNDERS, IV
CROSTHWAIT, TERNEY, NOBLE & EASTLAND
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 352-5533
100 Court Street
Indianola, Mississippi 38751
(601) 887-3412
Attorneys for Appellees, the State of Mississippi and the Mississippi Public Service Commission

BILL ALLAIN
Attorney General of the
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205
(601) 354-7130

BENNETT E. SMITH
Assistant Attorney General and
Attorney for the Mississippi
Public Service Commission
P. O. Box 1174
Jackson, Mississippi
(601) 354-7216

QUESTIONS PRESENTED*

Pursuant to its power to regulate interstate commerce, U.S. Const. art. I, § 8, cl. 3, Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub.L. No. 95-617, 92 Stat. 3117 *et seq.*

Titles I and III of PURPA establish certain federal rate design and regulatory standards for electric and natural gas utilities, provide that these federal standards supplement otherwise applicable state law, and require state regulatory authorities to consider the adoption of these standards after following specific procedures mandated by Titles I and III.

Section 210 of Title II of PURPA requires state regulatory authorities to implement rules promulgated by the Federal Energy Regulatory Commission under which regulated electric utilities must offer to sell electricity to and purchase electricity from qualifying cogeneration and small power production facilities.

The questions presented in this case are:

1. In enacting PURPA, did Congress exceed its power to regulate interstate commerce?, and

---

*As required by Sup.Ct.R. 34.1(b), the following list identifies all parties before the district court:

Plaintiffs-Appellees: The State of Mississippi, by and through Attorney General Bill Allain, the successor in office to former Attorney General A. F. Summer, and the Mississippi Public Service Commission, composed of Commissioners D. W. Snyder, Norman A. Johnson, Jr., and Lynn Havens, the successor in office to John L. Dale. See J.A. 3.

Plaintiff-Intervenor-Appellee: Mississippi Power & Light Company, a Mississippi corporation which is affiliated with Middle South Utilities. See J.A. 13.

Defendants-Appellants: The Federal Energy Regulatory Commission and Secretary of Energy James B. Edwards, the successor in office to former Secretaries of Energy James R. Schlesinger and Charles W. Duncan, Jr. See J.A. 5.

2. Does PURPA unconstitutionally infringe upon state sovereignty in violation of the Tenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Questions Presented 1
Opinion Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement of the Case 2
A. The Statute at Issue 2
1. Titles I and III of PURPA 2
2. Section 210 of Title II of PURPA 5
B. The Proceedings Below 6
Summary of Argument 8
Argument 11
I. The Provisions of the Public Utility Regulatory Policies Act of 1978 Violate Tenth Amendment Limitations on the Commerce Clause 11
A. PURPA Regulates the States 13
B. PURPA Addresses Matters That Are Indisputably Attributes of State Sovereignty 19
C. Compliance by Mississippi With PURPA Would Directly Impair Mississippi's Ability to Structure Integral Operations in Areas of Traditional Functions 24
1. Public Utility Regulation Is an Integral Operation in the Area of the Traditional Functions Performed by the State of Mississippi 24
2. PURPA Impairs the State's Ability to Structure Its Operations in the Area of Public Utility Regulation 27
3. There Is No Federal Interest to Justify PURPA's Intrusion Into the Domain of the States 34

D. PURPA Offends Basic Concepts of Federalism 39
II. PURPA Is an Invalid Exercise of Congressional Authority Under the Commerce Clause Since It Does Not Regulate Commerce 41
Conclusion 50
Certificate 50

Table of Authorities

Cases

Adams v. Maryland, 347 U.S. 179 (1954) 21
Addington v. Texas, 441 U.S. 418 (1979) 25
Alewine v. City Council of Augusta, 505 F. Supp. 880 (S.D. Ga. 1981) 25
Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) 24, 25, 26
Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded, EPA v. Brown*, 431 U.S. 99 (1977) 18, 43
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 7, 42, 43, 45
City of Rome v. United States, 446 U.S. 156 (1980) 22
Cleveland v. United States, 399 U.S. 14 (1946) 41
Coyle v. Oklahoma, 221 U.S. 559 (1911) 23, 40
Condor Operating Co. v. Sawhill, 514 F.2d 351 (TECA 1979), *cert. denied*, 421 U.S. 976 (1975) 38
Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) 25
Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) 24
District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1975), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F. 2d 1091 (D.C. Cir. 1977) 18, 20-21, 27, 43, 44
EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981) 25

FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 20
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 12, 20
Fry v. United States, 421 U.S. 542 (1975) 25, 34, 37
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 41
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 45-46
Hodel v. Virginia Surface Mining and Reclamation Ass'n, 101 S. Ct. 2352 (1981) ..... passim
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 20
Independent Gasoline Marketers v. Duncan, 492 F. Supp. 614 (D.D.C. 1980) 35, 50
In re Duncan, 139 U.S. 449 (1891) 23
Juidice v. Vail, 430 U.S. 327 (1977) 39
Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) 21, 22
Kentucky Power & Light Co. v. City of Maysville, 36 F.2d 816 (E.D. Ky. 1929) 19
Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869) 19, 40
The License Cases, 46 U.S. (5 How.) 504 (1847) 19
Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded sub nom. EPA v. Brown*, 431 U.S. 99 (1977) 23, 43
Maryland v. Wirtz, 392 U.S. 183 (1968) 40, 46, 50
Massachusetts v. United States, 435 U.S. 444 (1978) 39
Mayor v. Educational Equality League, 415 U.S. 605 (1974) 39
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 32
Metcalf v. Mitchell, 269 U.S. 514 (1926) 21
Mississippi v. FERC, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981) 11

Mobil Oil Corp. v. DOE, 610 F.2d 796 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980) 38
Monell v. Dep't of Soc. Services, 436 U.S. 658 (1978) 22
Montana-Dakota Utilities Co. v. Johanneson, 153 N.W. 2d 414 (N.D. 1967) 19-20
Moore v. Sims, 442 U.S. 415 (1979) 39
Munn v. Illinois, 94 U.S. 113 (1877) 19, 20, 25
NLRB v. Highview, Inc., 590 F.2d 174 (5th Cir. 1979) 25
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 41, 46
National League of Cities v. Usery, 426 U.S. 833 (1976) ..... *passim*
New State Ice Co. v. Liebman, 285 U.S. 262 (1932) 25
Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) 20
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 25
Rizzo v. Goode, 423 U.S. 362 (1976) 39
Samuels v. Mackell, 401 U.S. 66 (1971) 39
Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938) 10, 41, 42, 45
South Carolina v. United States, 199 U.S. 437 (1905) 19
Standard Oil v. DOE, 596 F.2d 1029 (TECA 1979) 38
Testa v. Katt, 330 U.S. 386 (1947) 21
Trainor v. Hernandez, 431 U.S. 434 (1977) 39
United Gas Pipeline Co. v. Mississippi Public Service Comm'n, 241 Miss. 762, 133 So.2d 521 (1961) 30
United States v. Best, 573 F.2d 1095 (9th Cir. 1978) 25
United States v. California, 297 U.S. 175 (1936) 44
United Transportation Union v. Long Island Rail Road Co., 634 F.2d 19 (2d Cir. 1980) 26
Wickard v. Filburn, 317 U.S. 111 (1942) 46
Younger v. Harris, 401 U.S. 37 (1971) 39

CONSTITUTION, STATUTES AND REGULATIONS

United States Constitution:
Article I, Section 8, Clause 3 (Commerce Clause) ..... passim
Article IV, Section 4 (Republican Form of Government) 8
Article VI, Section 2 (Supremacy Clause) 8
Tenth Amendment ..... passim
Fourteenth Amendment, Section 5 22
Airborne Hunting Act, 16 U.S.C. § 7401 *et seq.* (Supp. III 1979) 42
Clean Water Act, 33 U.S.C. § 1251 *et seq.* (Supp. III 1979) 42
Emergency Energy Conservation Act of 1979, Pub. L. 96-102, 93 Stat. 749 *et seq.* 37, 38
Energy Conservation and Production Act of 1976, Pub. L. 94-385, 90 Stat. 1125 *et seq.* 37
Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 *et seq.* 37
Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.* 2
Federal Power Act of 1920, 16 U.S.C.:
Section 825m(a)-(b) 17, 31, 39
Section 825n-o 17, 31, 39
National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 *et seq.* 2, 35
Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.* 2
Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 *et seq.* 2, 35, 36
Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* ..... I, 2, 11

Title I, 16 U.S.C. § 2601 (Supp. III 1979) *et seq.* 11
Section 2, 16 U.S.C. § 2601 (Supp. III 1970) 47
Section 101, 16 U.S.C. § 2611 (Supp. III 1979) 2
Section 111, 16 U.S.C. § 2621 (Supp. III 1979) 3, 15, 39
Section 111(a), 16 U.S.C. § 2621(a) (Supp. III 1979) 2
Section 111(b), 16 U.S.C. § 2621(b) (Supp. III 1979) 3
Section 111(c), 16 U.S.C. § 2621(c) (Supp. III 1979) 3
Section 111(c)(2), 16 U.S.C. § 2621(c)(2) (Supp. III 1979) 28
Section 112, 16 U.S.C. § 2622 (Supp. III 1979) 15, 28
Section 112(b), 16 U.S.C. § 2622(b) (Supp. III 1979) 3
Section 112(c), 16 U.S.C. § 2622(c) (Supp. III 1979) 3
Section 113, 16 U.S.C. § 2623 (Supp. III 1979) 3, 15, 28, 39
Section 113(a), 16 U.S.C. § 2623(a) (Supp. III 1979) 2
Section 113(c)(2), 16 U.S.C. § 2623(c)(2) (Supp. III 1979) 28
Section 114, 16 U.S.C. § 2624 (Supp. III 1979) 4, 16, 30
Section 115, 16 U.S.C. § 2625 (Supp. III 1979) 28
Section 116, 16 U.S.C. § 2626 (Supp. III 1979) 5, 17, 31

Section 121, 16 U.S.C. § 2631 (Supp. III 1979) 4, 15, 28
Section 121(a), 16 U.S.C. § 2631(a) (Supp. III 1979) 29
Section 122(c), 16 U.S.C. § 2632(c) (Supp. III 1979) 16
Section 123, 16 U.S.C. § 2633 (Supp. III 1979) 16, 17
Section 123(a), 16 U.S.C. § 2633(a) (Supp. III 1979) 16, 17
Section 123(c), 16 U.S.C. § 2633(c) (Supp. III 1979) 18
Section 123(c)(1), 16 U.S.C. § 2633(c)(1) (Supp. III 1979) 4, 17, 31, 39
Section 123(c)(3), 16 U.S.C. § 2633(c)(3) (Supp. III 1979) 17
Section 133, 16 U.S.C. § 2643 (Supp. III 1979) 5
Section 141, 42 U.S.C. § 6807 (Supp. III 1979) 6, 33
Section 142, 42 U.S.C. § 6808 (Supp. III 1979) 33

Title II, 16 U.S.C. § 796, *et seq.*:

Section 201(17)(A), 16 U.S.C. § 796(17)(A) (Supp. III 1979) 5
Section 201(18)(A), 16 U.S.C. § 796(18)(A) (Supp. III 1979) 5
Section 210, 16 U.S.C. § 824a-3 (Supp. III 1979) 5, 17, 30
Section 210(a), 16 U.S.C. § 824a-3(a) (Supp. III 1979) 5
Section 210(e), 16 U.S.C. § 824a-3(e) (Supp. III 1979) 6

Section 210(f), 16 U.S.C. § 824a-3(f) (Supp. III 1979) 6
Section 210(h), 16 U.S.C. § 824a-3(h) (Supp. III 1979) 6
Section 210(h)(2)(a), 16 U.S.C. §824a-3(h)(2)(a) (Supp. III 1979) 30
Title III, 15 U.S.C. § 3201 (Supp. III 1979) *et seq.* 2
Section 303, 15 U.S.C. § 3203 (Supp. III 1979) 4, 15, 28, 35
Section 303(a), 15 U.S.C. § 3203(a) (Supp. III 1979) 2
Section 303(c), 15 U.S.C. § 3203(c) (Supp. III 1979) 3
Section 304, 15 U.S.C. § 3204 (Supp. III 1979) 28
Section 305, 15 U.S.C. § 3205 (Supp. III 1979) 4
Section 306, 15 U.S.C. § 3206 (Supp. III 1979) 5
Section 307(b)(1), 15 U.S.C. § 3207(b)(1) (Supp. III 1979) 4
Section 307(b)(2), 15 U.S.C. § 3207(b)(2) (Supp. III 1979) 5
Section 309, 15 U.S.C. § 3209 (Supp. III 1979) 5
Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 445 *et seq.* 13
Title V, 30 U.S.C. § 1252 *et seq.*:
30 U.S.C. § 1252 (Supp. III 1979) 14
30 U.S.C. § 1254 (Supp. III 1979) 14
30 U.S.C. § 1265(d)-(e) (Supp. III 1979) 14
30 U.S.C. § 1268 (Supp. III 1979) 14
42 U.S.C. § 1983 (1976) 22
Miss. Code Ann. § 77-3-39 (Supp. 1980) 29
18 C.F.R. part 292; 45 Fed. Reg. 12214-12237 (1980) 6

MISCELLANEOUS

The Comptroller General, U. S. General Accounting Office. *Burdensome and Unnecessary Reporting Requirements of the Public Utility Regulatory Policies Act Need to Be Changed*, EMD-81-105 (Sept. 14, 1981) 32, 33

123 Cong. Rec. 32662 (1977) 29

Hearings on Oversight Pertaining to the Implementation of the Public Utility Regulatory Policies Act of 1978, with Particular Reference to Titles I and II, Before the House Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, ser. 96-61, 96th Cong., 1st Sess. (June 18-19, 1979) 31

H.R. 8444, 95th Cong., 1st Sess. (1977) 21

H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 63, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797 ..... 15, 16, 17, 29, 30, 31, 39

H.R. Rep. No. 95-496 (Pt. 4), 95th Cong., 1st Sess. 129 (1977) 47

Joskow, *Public Utility Regulatory Policies Act of 1978: Electric Utility Rate Reform*, 19 NAT. RES. J. 787 (1979) 13

OIL & GAS J. 48 (Oct. 12, 1981) 37

Secretary's Annual Report to Congress, January 1980 37

S. Rep. No. 95-361, 95th Cong., 2d Sess. 35, *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173 ..... 36, 50

S. Rep. No. 95-442, 95th Cong., 1st Sess. 9 (1977) 35, 48

Supreme Court Rule 34.1 (b) 1

No. 80-1749

In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLEES STATE OF MISSISSIPPI AND MISSISSIPPI PUBLIC SERVICE COMMISSION

OPINION BELOW

The opinion of the district court (J.S. App. 1a-7a) is not reported.

JURISDICTION

The basis for this Court's jurisdiction is adequately stated in the Brief for the Appellants at 1-2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this appeal are adequately identified in the Brief for the Appellants at 1 and adequately set forth at J.S. App. 12a-67a.

STATEMENT OF THE CASE

A. The Statute at Issue

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* [PURPA], was enacted by Congress as part of a package of nationwide energy legislation.[1]

1. Titles I and III of PURPA

Titles I and III of PURPA share three common purposes: (1) to encourage conservation of energy supplied by electric and gas utilities; (2) to encourage the optimization of the efficiency of use of facilities and resources by electric and gas utilities; and (3) to encourage equitable rates to electric and gas consumers. 16 U.S.C. § 2611 (Supp. III 1979); 15 U.S.C. § 3201 (Supp. III 1979). To achieve these goals, Titles I and III "supplement" otherwise applicable state law by requiring that state regulatory authorities and nonregulated utilities "shall consider" whether to adopt and implement specific federal rate design and regulatory standards. 16 U.S.C. §§ 2621(a) & 2623(a) (Supp. III 1979); 15 U.S.C. § 3203(a) (Supp. III 1979).

In addition, Titles I and III of PURPA impose specific procedural requirements on state regulatory authorities and nonregulated utilities in their consideration and determination of these federal standards. Specifically, Titles I and III require that the consideration of the standards "shall be made after public notice and hearing," that the deter-

---

1. This legislative package also included the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; and the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 *et seq.*

mination as to whether to adopt and implement the standards shall be in writing, based upon findings included in the determination and upon evidence presented at the hearing, and that this determination be made available to the public. In addition, Titles I and III require that if a state regulatory authority or a nonregulated utility determines not to implement one of these standards, then such determination shall be made in writing and available to the public. 16 U.S.C. § 2621(b) & (c) (Supp. III 1979); 15 U.S.C. § 3203(c) (Supp. III 1979).

Section 111 of PURPA, 16 U.S.C. § 2621 (Supp. III 1979), requires each state regulatory authority or nonregulated utility to consider whether to adopt and implement the following federal rate design standards: (1) cost of service-rates for each class of electric consumers should reflect the cost of service to that class; (2) prohibition of declining block rates; (3) time-of-day rates; (4) seasonal rates; (5) interruptible rates; and (6) development of load management techniques. Consideration of these federal standards was to have commenced not later than two years after PURPA's enactment, or by November 8, 1980, and a decision whether to adopt these federal standards is to be made by November 8, 1981. 16 U.S.C. § 2622(b) (Supp. III 1979). The statute provides that if the federal standards are not considered by November 8, 1980, the state regulatory authorities or nonregulated utilities must consider these federal standards and determine whether to adopt them in the first rate proceeding commenced after November 8, 1981. 16 U.S.C. § 2622(c) (Supp. III 1979).

Section 113 of PURPA, 16 U.S.C. § 2623 (Supp. III 1979), requires state regulatory authorities (and nonregulated utilities) to consider the adoption of a second set of federal standards relating to the terms and conditions of electric service: (1) prohibition of master metering

in new buildings; (2) restrictions on the use of automatic adjustment clauses; (3) disclosure to consumers of information concerning rate structures; (4) procedural requirements relating to termination of service; and (5) prohibition of the recovery of advertising costs from consumers. Section 303 of Title III, 15 U.S.C. § 3203 (Supp. III 1979), requires state regulatory authorities (and nonregulated utilities) to consider the adoption of the latter two regulatory standards with respect to natural gas utilities. A decision as to the standards contained in Sections 113 and 303 was to have been made by November, 1980. Under Section 114 of Title I, 16 U.S.C. § 2624 (Supp. III 1979), each state regulatory authority (and nonregulated utility) is also required to consider whether utilities should set lower electrical rates for essential needs of residential consumers if the utility does not have such a rate in effect in November, 1980.

Titles I and III allow "any person" to bring an action in state court to enforce the obligation to hold hearings and make determinations concerning these federal standards. 16 U.S.C. § 2633(c)(1) (Supp. III 1979); 15 U.S.C. § 3207(b)(1) (Supp. III 1979).

The Secretary of Energy, affected utilities, and consumers have the right to intervene and participate in any rate-related proceeding considering the Title I standards. 16 U.S.C. § 2631 (Supp. III 1979). Only the Secretary has the right of intervention under Title III. 15 U.S.C. § 3205 (Supp. III 1979). PURPA provides that any person (including the Secretary) who has intervened or otherwise participated in the original proceeding may obtain review in state court of any determination made with respect to the adoption of the Title I standards. 16 U.S.C. § 2633 (c)(1) (Supp. III 1979). PURPA does not authorize the Secretary to seek judicial review of decisions regarding the Title III standards. However, he may participate as

an amicus curiae in any judicial review proceeding initiated by other persons. 15 U.S.C. § 3207(b)(2) (Supp. III 1979).

Titles I and III also contain certain reporting requirements. Within one year after PURPA's enactment, and annually thereafter for ten years, state regulatory authorities (and nonregulated utilities) are to report the progress of their consideration and implementation of the Title I and III standards to the Secretary of Energy, who, in turn, is to submit a summary and analysis of these reports to Congress. 16 U.S.C. § 2626 (Supp. III 1979); 15 U.S.C. § 3209 (Supp. III 1979). Under Section 133, 16 U.S.C. § 2643 (Supp. III 1979), electric utilities are directed to collect information concerning their service costs. This information must be filed periodically with the Federal Energy Regulatory Commission and appropriate state regulatory agencies and must be made available to the public. Title III requires the Secretary of Energy, in consultation with FERC, state regulatory authorities, gas utilities and gas consumers, to submit a report to Congress on gas utility rate design. 15 U.S.C. § 3206 (Supp. III 1979).

2. Section 210 of Title II of PURPA

Section 210 was designed to encourage the development of cogeneration and small power production facilities. 16 U.S.C. § 824a-3 (Supp. III 1979.) "Cogeneration" is the combined production of both electrical energy and useful thermal energy such as heat or steam. 16 U.S.C. § 796(18)(A) (Supp. III 1979). A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass waste, or renewal resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C. § 796(17(A) (Supp. III 1979).

Section 210(a), 16 U.S.C. § 824a-3(a) (Supp. III 1979) directs the Federal Energy Regulatory Commission, in con-

sultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U.S.C. § 824a-3(f) (Supp. III 1979), requires each state regulatory authority and nonregulated utility to implement the rules adopted by the Commission under Section 210(a) regarding the purchase and sale of electricity to and from qualifying facilities. In Section 210(h), 16 U.S.C. § 824a-3(h) (Supp. III 1979), the Commission is authorized to enforce this requirement in federal court against any state regulatory authority or nonregulated utility; if the Commission does not act after being requested to do so, enforcement may be sought by an electric utility or qualifying facility.

Section 210(e), 16 U.S.C. § 824a-3(a) (Supp. III 1979), directs the Commission to prescribe rules under which such qualifying facilities are exempt from certain state and federal laws governing electric utilities.

Pursuant to Section 210(a), the Commission has adopted rules related to purchases and sales of electricity to and from qualifying facilities. 18 C.F.R. part 292; 45 Fed. Reg. 12214-12237 (1980).

PURPA authorizes the Secretary of Energy to make grants to state regulatory authorities to "assist" them in carrying out their "duties and responsibilities" under Titles I and III and Section 210. 42 U.S.C. § 6807 (Supp. III 1979).

B. The Proceedings Below

On April 24, 1979, appellees, the State of Mississippi and the Mississippi Public Service Commission, filed this action against the Federal Energy Regulatory Commission

and the Secretary of Energy in the United States District Court for the Southern District of Mississippi, seeking a declaratory judgment that Titles I and III and Section 210 of PURPA are unconstitutional (J.A. 1, 3-12). Mississippi Power and Light Company was permitted to intervene as a plaintiff in the action. Appellees alleged that PURPA is beyond the scope of Congress' power under the Commerce Clause and that PURPA constitutes an invasion of state sovereignty in violation of the Tenth Amendment. The essence of appellees' argument was that PURPA impermissibly infringes on Mississippi's retail ratemaking authority over intrastate sales by public utilities located in the state and places an intolerable burden on state public utility regulatory activities.

Following cross-motions for summary judgment by all parties, the district court held that PURPA exceeds Congress' powers under the Commerce Clause (J.S. App. 1a-7a). Citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the district court recognized that Congress had no power to regulate anything which is not commerce, and the district court concluded that Congress exceeded its authority under the Commerce Clause (J.S. App. 3a-4a).

The district court also observed that the Mississippi Public Service Commission was authorized under state law "to regulate and control intrastate activities and policies of all utilities operating within the sovereign state of Mississippi." (J.S. App. 2a). Citing the Tenth Amendment (J.S. App. 2a n. 2) and this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (J.S. App. 5a-6a n. 4), the district court explained (*id.* at 7a):

> The United States is simply not delegated or vested by the Constitution with the power or authority to displace and to usurp the regulatory power and authority of the state of Mississippi over these util-

> ities in the exercise of their intrastate functions and duties with respect to their intrastate customers in Mississippi. This Act simply does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution.

Accordingly, the district court concluded that "the United States does not have the power or authority to impose its three standards under PURPA upon the State of Mississippi under the guise of providing the solution to the nation's energy problems." (*Id.*).

In its final judgment (J.S. App. 8a-9a), the district court declared that it found Titles I and III and Section 210 of PURPA unconstitutional and void "in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4 . . . ."

SUMMARY OF ARGUMENT

The district court's decision invalidating all of Titles I and III and Section 210 of PURPA rests on two grounds. First, the district court held that the statutory provisions are beyond Congress' power under the Commerce Clause because they are directed to governmental activity as opposed to "commerce." Second, the district court ruled that the provisions violate the Tenth Amendment because they directly displace the traditional authority of the states to regulate the intrastate activities of such utilities. Both of these conclusions are sound and warrant this Court's affirmance of the district court's judgment. In fact, even assuming arguendo the validity of Congress'

exercise of the Commerce power, the Tenth Amendment provides an affirmative limitation on Congress' actions under the Commerce power.

I.

The challenged statutes, enacted pursuant to the Commerce Clause, violate the Tenth Amendment as interpreted by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981). The three prerequisites for a successful Tenth Amendment challenge to Commerce Clause legislation, *id.* at 2366, are clearly satisfied in this case. First, PURPA clearly regulates the states as states. Second, PURPA obviously addresses matters that are indisputably attributes of state sovereignty, *i.e.* the regulation of public utilities pursuant to the states' inherent police power. Third, it is apparent that the states' compliance with PURPA directly impairs their ability to structure their integral operations in an area of traditional function for state governments—the regulation of public utilities.

PURPA's unconstitutional intrusion on state sovereignty is evident in at least three ways. PURPA intrudes into the policy making area of state utility regulation by requiring state regulatory authorities to consider federal ratemaking standards and to determine whether those federal standards should be adopted in the state. PURPA also impairs the state's ability to structure its operations in the area of utility regulation by appropriating and commandeering the state regulatory machinery for the purpose of implementing federal policy. Finally, the cost of implementing PURPA's requirements places an oppressive burden on the states.

PURPA also fails to pass Tenth Amendment muster when the state sovereignty interest is balanced against

the asserted federal interest of Congress' attempting to combat a nationwide energy crisis. The asserted federal interest, *i.e.* conservation of oil, is weak because only a "slight" savings of oil will be produced by PURPA according to the most optimistic estimates. On the other hand, the state interest of establishing state policies and state mechanisms for implementing those policies is clearly disrupted by PURPA's commandeering of the state regulatory authorities for the purpose of achieving PURPA's goals.

This case is clearly analogous to *National League of Cities v. Usery, supra,* where this Court invalidated Congress' attempt to impose federal minimum wage guidelines on state and local governments. On the other hand, this case is not analogous to this Court's decision in *Fry v. United States,* 421 U.S. 542 (1975), where the Court upheld the constitutionality of Congress' emergency freeze on wages and salaries already being paid by state and local governments.

In sum, the balance in this case between the competing state and federal interests is properly struck in favor of the state interest.

II.

PURPA is an invalid exercise of congressional authority under the Commerce Clause for two reasons.

First, this Court's precedents, *Santa Cruz Fruit Packing Co. v. NLRB,* 303 U.S. 453, 466 (1938); *National League of Cities v. Usery,* 426 U.S. at 860 (Brennan J., dissenting), recognized that under the Commerce Clause Congress may only regulate "commerce." Here, PURPA does *not* regulate commerce. The Act regulates the governmental activities of the states by directing unconsenting states to regulate activities allegedly affecting interstate com-

merce. The Commerce Clause simply does not authorize this type of regulation.

Second, PURPA is invalid under this Court's precedents, *Santa Cruz Fruit Packing Co. v. NLRB*, because there is no congressional finding that the activities regulated by PURPA, the state regulatory authorities, have a substantial effect on interstate commerce. Without such a finding, PURPA is clearly irrational and therefore unconstitutional under the Commerce Clause. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. at 2360.

ARGUMENT

I.

The Provisions of the Public Utility Regulatory Policies Act of 1978 Violate Tenth Amendment Limitations on the Commerce Clause

The district court correctly held "that Title I, Section 210 of Title II and Title III of the Public Utility Regulatory Policies Act of 1978, Public Law 95-617, 92 Stat. 3119, 16 U.S.C. § 2601, are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi . . . ." *Mississippi v. FERC*, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981) (Final Judgment at 1-2) (J.S. App. 8a-9a).

The Public Utility Regulatory Policies Act of 1978 [hereinafter "PURPA" or the "Act"] marks the first time Congress has attempted to govern the manner in which state regulatory authorities regulate gas and electric utilities. These sections of PURPA which the lower court held unconstitutional plainly invade the separate and independent sphere of state power involved in performing the traditional state governmental function of regulating elec-

tric and gas utilities. Under the clear authority of recent decisions of this Court, the lower court was manifestly correct in holding that such an impermissible federal intrusion into the manner in which this state has traditionally performed its function of retail ratemaking transgresses the bounds of federal authority granted Congress under the Commerce Clause.

Appellees do not disagree with Appellants' strident argument that this congressional power over commerce may even entail the power of total preemption of all state regulation of commerce.[2] *Virginia Surface Mining*, 101 S. Ct. at 2367.

However, this Court has made it abundantly clear that states "stand on quite a different footing" when challenging congressional commerce regulation than do private entities "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." *National League of Cities v. Usery*, 426 U.S. 833, 845, 854 (1976).

Last term this Court reaffirmed its holding in *National League of Cities* in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981). The Court stated that a successful claim that congressional legislation is unconstitutional under the *National League of Cities* ruling must meet three requirements:

---

2. Brief for the Appellants at 27-28. Federal preemption, however, is not presumed from the mere fact of federal action in a particular area. To the contrary,

> [F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

> First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

101 S. Ct. at 2366.

A review of the challenged provisions of PURPA in the light of *Virginia Surface Mining* and *National League of Cities* will lead to the inescapable conclusion that PURPA embodies all three of the foregoing constitutionally forbidden characteristics.

A.

PURPA Regulates the States

The first requirement of the tripartite *National League of Cities* test is that the challenged legislation regulates the states as states.[3] *Virginia Surface Mining*, 101 S. Ct. at 2366. PURPA is plainly a regulation of the states in their governmental capacities.[4]

Despite Appellants' arguments to the contrary, the provisions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 445 [*et seq.*] (SMCRA),

---

3. Appellants have not even attempted to address this aspect of the *National League of Cities* analysis in their Brief, apparently recognizing and conceding that the Act does indeed directly regulate the Mississippi Public Service Commission. On pages 28 and 29 of their Brief Appellants first state, "[t]o be sure, the statute in suit places certain regulatory responsibilities upon the states," and they then include a laborious list of statutory provisions that "do more than 'allow' state regulation."

4. One commentator has described PURPA as "an effort by the federal government to affect the ways in which state public utility commissions regulate the retail sales of electric and gas utility companies." Joskow, *Public Utility Regulatory Policy Act of 1978: Electric Utility Rate Reform*, 19 Nat. Res. J. 787 (1979).

at issue in *Virginia Surface Mining* are not at all analogous to the provisions of PURPA held unconstitutional. The contested sections of SMCRA, *inter alia*, established certain minimum regulatory standards which affected states were required to adopt if the states wished to continue regulating the surface mining of coal. 30 U.S.C. §§ 1265 (d)-(e) (Supp. III 1979). By failing to conform to the federal standards, an affected state would surrender all of its regulatory authority to the federal government. 30 U.S.C. § 1254 (Supp. III 1979). The affected states were not compelled to take any action regarding the SMCRA "standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Virginia Surface Mining*, 101 S. Ct. at 2366. If a state chose not to adopt the regulatory program, federal law simply would have preempted and superceded non-complying state regulations. 30 U.S.C. § 1254 (Supp. III 1979). Since Congress could have constitutionally prohibited all state regulation of coal mining, allowing some state regulation in the field was valid under the Commerce Clause. 101 S. Ct. at 2367.

Unlike PURPA, the challenged provisions of the SMCRA did not regulate the states as states. To the contrary, the state was given a choice: the state could regulate pursuant to the congressionally established minimum standards, or the state could yield to preemptive, federal regulation. *Virginia Surface Mining*, 101 S. Ct. at 2367. Compliance by the state with the Act was purely voluntary, 30 U.S.C. § 1252 (Supp. III 1979), and the only penalties or remedies provided for violations of the Act were directed at private entities, not toward the states. 30 U.S.C. § 1268 (Supp. III 1979).

PURPA presents an entirely different case than did the SMCRA at issue in *Virginia Surface Mining*. Even the Appellants admit that the challenged provisions of PURPA go beyond simply allowing state regulation and

affirmatively place "certain regulatory responsibilities upon the states." Brief for the Appellants at 28-29. PURPA's imposition of regulatory responsibilities upon the states is artful but very real. For instance, section 111 of the Act establishes six federal ratemaking design standards. 16 U.S.C. § 2621 (Supp. III 1979). Section 112 requires the state regulatory authority to consider whether to adopt each of the standards within two years of enactment of PURPA and to reach a decision whether to adopt the standards within three years of enactment. 16 U.S.C. § 2622 (Supp. III 1979). If the state fails to make the required determination within three years of enactment, it must consider the standards as part of the first rate proceeding held thereafter for each affected utility. *Id.*

Titles I and III of PURPA also prescribe rules which the state regulatory authority must follow in considering the federally established standards. Section 111, 113, and 303 unabashedly dictate "procedural requirements" for consideration of PURPA's standards. 16 U.S.C. §§ 2621 and 2623; 15 U.S.C. § 3203 (Supp. III 1979). Each of these sections further supplement "otherwise applicable State law."[5] Section 121 confers upon the Secretary of Energy, affected utilities, and any consumer the right to initiate, intervene and participate in the consideration and determination processes. 16 U.S.C. § 2631 (Supp. III 1979).

The state regulatory authority is also required to provide any intervenor or participant with all information available to other parties and to promulgate rules of discovery to govern the obtaining of that information. *Id.* Additionally, the state must make transcripts of the consideration proceedings available to requesting parties. 16

---

5. These provisions provide additional statutory authority to a state to permit a state to carry out these federal mandates. H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 63, 70-71, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7804-05 [hereinafter cited as Conference Report].

U.S.C. § 2632(c) (Supp. III 1979). This federally created right to intervene is enforceable against the state regulatory authority by an action in federal court. 16 U.S.C. § 2633 (Supp. III 1979).

Federal intrusion does not end at the consideration and determination stage. Section 123(c) grants the right of review to any intervenor or participant in the consideration and determination process. 16 U.S.C. § 2633 (Supp. III 1979). Additionally, section 123 grants to the Secretary of Energy the right to participate as an amicus curiae in any court action arising under subtitles A or B of Title I. *Id.* Furthermore, the requirements of PURPA override state law to the extent of any procedural conflict with the practice normally followed by the state regulatory authority in performing its regulatory functions.[6]

Section 113 is less subtle. It prescribes five federal standards related to electrical service and requires the state to adopt the same "if, and to the extent, such authority . . . determines that such adoption is appropriate to carry out the purposes of this chapter, is otherwise appropriate, and is consistent with otherwise applicable state law . . . ." 16 U.S.C. § 2623(a) (Supp. III 1979). The effect of section 113 is to compel the state to adopt the standards so long as the standards do not conflict with established state law. The state regulatory authority is thus deprived of its right to select what it considers to be the best policy for the state and is forced instead to choose federal standards that may be merely "appropriate."

Title I, section 114 requires each state regulatory authority to consider rates below cost (lifeline rates) for certain customers if the regulated utilities do not already have such schedules in effect. 16 U.S.C. § 2624 (Supp. III 1979).

---

6. Conference Report at 71, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7805.

Section 116 prescribes that the state regulatory authority make annual reports "to the Secretary, in such manner as the Secretary shall prescribe." 16 U.S.C. § 2626 (Supp. III 1979). The reports must be made "not later than one year after November 9, 1978, and annually thereafter for ten years." *Id.*

All of these statutory provisions may be enforced by a writ of mandamus upon an action brought by the Secretary of Energy in state court.[7]

Title II, Section 210 is probably the most blatant regulation of the states contained in PURPA. 16 U.S.C. § 824a-3 (Supp. III 1979). Section 210 mandates that each state regulatory authority shall implement federally promulgated rules governing each electric utility over which that regulatory authority has jurisdiction. The Federal Energy Regulatory Commission (FERC) has the authority to enforce Section 210 by civil and criminal penalties. 16 U.S.C. §§ 825m(a)-(b), § 825n-o (1976).

Obviously these provisions are directed to and against the states as states. Not only are the State of Mississippi and its sister states required to consider standards, the states are compelled to justify why the standards are not adopted, if that be the case, and must be ready to defend

---

7. Section 123(c)(1), 16 U.S.C. § 2633(c)(1) (Supp. III 1979); Conference Report at 84, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7818. Judicial review and enforcement of the standards, the obligation to consider their implementation, and the provisions for intervention and participation in rate proceedings are primarily in the state courts. Section 123(a), (c)(1), 16 U.S.C. § 2633(a), (c)(1) (Supp. III 1979). When a party unsuccessfully attempts to enforce its right of intervention, however, or when a federal agency is an affected utility, review is available in the federal courts. *Id.* § 123, 16 U.S.C. § 2633 (Supp. III 1979). Appeal may lie to the federal courts even if it was denied in the state courts as interlocutory or otherwise premature. Conference Report at 84, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7818. The Secretary of Energy may file an amicus brief in any judicial review of a proceeding of a state regulatory authority regardless of whether he participated in the original proceedings. Section 123(c)(3), 16 U.S.C. § 2633(c)(3) (Supp. III 1979).

their actions in court, because PURPA purports to give standing and a right to appeal to those wishing to oppose the state decision. If the state fails to implement any of these requirements, the requirements can be enforced by mandamus, and if the state fails to implement the federally promulgated rules under Title II, Section 210, it becomes subject to civil and criminal penalties.

Contrary to the suggestion of Appellants, Brief for the Appellants at 28-29, the State of Mississippi submits that PURPA does, indeed, do much more than "allow" state regulation. The provisions of PURPA held unconstitutional by the lower court unabashedly commandeer the Mississippi Public Service Commission to implement and enforce the federal standards. On its face PURPA is no mere preemption or displacement of state law. Nor is it a mere regulation of "individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside." *Virginia Surface Mining*, 101 S. Ct. at 2369, *quoting National League of Cities*, 426 U.S. at 845. Obviously PURPA, under the federal commerce power, seeks to regulate state regulation of commerce[8] under the state's police power. Manifestly this Act is intended to and does indeed regulate the "States as States" and violates the first tenet enunciated in *Virginia Surface Mining*.

---

8. *See Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated and remanded EPA v. Brown*, 431 U.S. 99 (1977) (distinguishing "governance of commerce" by the states from "commerce" subject to congressional power: "A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress."); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1975), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.")

B.

PURPA Addresses Matters That Are Indisputably Attributes of State Sovereignty

As a second prerequisite to a Tenth Amendment challenge to federal legislation, *National League of Cities* requires that the contested legislation address a matter than is indisputably an attribute of state sovereignty. *Virginia Surface Mining*, 101 S. Ct. at 2366.

Appellants have made the naked assertion that the regulation of utilities is not "an essential attribute of state sovereignty." Brief for the Appellants at 30.

In our federal system, sovereignty has a dual nature. Upon the adoption of the United States Constitution, the states surrendered certain attributes of their sovereignty to the national government, with the result that our federalism is founded upon a concept of shared sovereignty, with both the states and the national government exercising their sovereign powers within their respective spheres. *See Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 72 (1869). This Court has repeatedly recognized that the states retain attributes of sovereignty which Congress may not impair. *National League of Cities*, 426 U.S. at 845.

Sovereignty has been characterized as "the power to govern men and things . . . ." *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847) (separate opinion of Taney, C. J.). One attribute of sovereignty, the police power, has been reserved to the states "in its fullest and broadest sense." *South Carolina v. United States*, 199 U.S. 437, 454 (1905). How that power shall be exercised has been left to the discretion of the states. *Id.* A state's regulatory authority over public utilities is undeniably a function of its police power. *Munn v. Illinois*, 94 U.S. 113, 125 (1877); *Kentucky Power & Light Co. v. City of Maysville*, 36 F.2d 816, 819 (E.D. Ky. 1929); *Montana-*

Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 420 (N.D. 1967). Manifestly, any federal legislation affecting the state's conduct of its public utility regulatory authority must address an attribute of that state's sovereignty.

Appellants suggest that the fact that Congress has historically legislated in the field of utility regulation deprives state utility regulation of its sovereign character. That argument is simply unsound. It is well known that the state, in exercising its police power, may act in many areas of interstate commerce concurrently with the federal government. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). To be sure, where federal and state regulations of commerce collide, the state must yield, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), but state utility regulation is nonetheless a function of the state's sovereignty. *See Munn v. Illinois*, 94 U.S. 113, 125 (1877).

The cases cited by Appellants as proof of the fact that Congress has acted in the field of utility regulation are irrelevant to the issue before this Court. *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), simply held that the Federal Power Act gave the FPC jurisdiction over all wholesale electric sales in interstate commerce, not just those constitutionally beyond the reach of the states. Likewise, *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), simply said that electricity sold in interstate commerce was subject to the regulation of the federal government and not the state government, which fact is not contested by Appellees.

The logic behind Appellants' assertion that the fact that Congress could constitutionally preempt the utility regulation filed validates PURPA is likewise infirm. PURPA does not present the states with a case of mere preemption. Rather, PURPA appropriates state legislative and regulatory power "to accomplish a federal regulatory objective." *District of Columbia v. Train*, 521

F.2d 971, 990 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1975), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977). Congress may not substitute "compelled state regulation for permissible federal regulation." 521 F.2d at 992.

As proof that PURPA is not intended to intrude into the spheres of the states, Appellants note that Congress rejected a version of PURPA, H.R. 8444, 95th Cong., 1st Sess. (1977), that would have established a utility regulatory program similar to the legislation at issue in *Virginia Surface Mining* in favor of a scheme which, according to Appellants, allows the states greater discretion in carrying out their regulatory function. Brief for the Appellants at 32. As this Court has pointed out, however, in the *Virginia Surface Mining* case, a SMCRA-type act does not compel the states to enforce a regulatory program. 101 S. Ct. at 2366.

Whether the rejected version of PURPA provided for more or less state discretion is irrelevant. The power to create governmental machinery to give effect to the will of the individual state is within that state's sphere of sovereignty and, consequently, immune from manipulation and interference by the federal government.[9] *Metcalf v. Mitchell*, 269 U.S. 514, 523 (1926); *see also Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (holding that

---

9. Appellants' citations of *Testa v. Katt*, 330 U.S. 386 (1947) and *Adams v. Maryland*, 347 U.S. 179 (1954), in support of their proposition that federal legislation is not invalid because it requires affirmative action are misplaced. *Testa*, for instance, simply said that a state court could not decline to enforce federal penal laws directed at individuals. No state functions were displaced. Neither did *Adams* involve the same questions raised by PURPA. *Adams* merely stands for the proposition that evidence given by a witness before a congressional committee pursuant to a congressional grant of immunity may not be used against the witness in state court.

the federal government cannot compel a state officer to do any act).[10]

PURPA goes much further than simply *addressing* matters which are "attributes of state sovereignty." The Act constitutes a direct regulation of state government decision-making. PURPA interferes with the most basic attribute of state sovereignty. It interferes with the independent decision-making function of the government of Mississippi in every area—legislative, administrative, and judicial. If the State of Mississippi is deprived of the ability to make these fundamental decisions as to how state courts and administrative tribunals will be operated, what laws it chooses to pass within its constitutional bounds, and how its regulatory agencies will be operated, then there will be little left of this State's independence that will make it distinguishable from the federal government as a separate entity existing in its own sovereign right.

The Act seeks to deprive the states of the ability to make certain governmental decisions which are judicial and legislative in character. Indeed, PURPA not only *addresses* "attributes of state sovereignty" but directly interferes with the most sovereign of states' attributes. The mandates of the Act usurp the quasi-legislative and quasi-judicial roles of the Mississippi Public Service Commission as well as state legislative and state judicial deci-

---

10. Citing *Monell v. Dep't of Social Services*, 436 U.S. 658, 676 (1978), the Appellants assert that *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), has not survived as precedent. Brief for the Appellants at 30 n. 34. This statement is wrong. *Monell's* discussion of *Dennison* is in the context of describing Congress' power under section 5 of the Fourteenth Amendment to enact 42 U.S.C. § 1983. As this Court has repeatedly noted, the Tenth Amendment does not restrict Congress' power to legislate pursuant to the Fourteenth Amendment, *Virginia Surface Mining*, 101 S. Ct. at 2365-66 n. 28; *City of Rome v. United States*, 446 U.S. 156, 159, 179 (1980), but it does limit Congress' legislative powers under the Commerce Clause. *Virginia Surface Mining*, 101 S. Ct. at 2365-66, n. 28. Thus, *Monell's* discussion of *Dennison* is irrelevant in this case.

sion-making. The lower court very properly recognized that such federal interference with these attributes of state sovereignty cannot be tolerated if federalism, as we know it today, is to continue to exist and if the states are to be allowed to function in this federal system.

National League of Cities made it clear that "Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *National League of Cities, supra*, 426 U.S. at 855. The Court, in *National League of Cities*, was concerned with the power of a state to fix its own wage and hour rules. The Court also pointed to *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), involving the sovereign powers of a state to decide when and where to locate its state capital. The one common feature to all these attributes of state sovereignty pointed out by the Court is the unfettered power of the state to make up its own mind what to do, which, of course, includes the power to decide to do nothing at all.[11]

Manifestly, PURPA is not aimed at the State of Mississippi as a provider of energy or as a provider of any commercial product, activities which could be conducted by private enterprise and do not depend upon a commitment of state power derived from the people. Private persons and organizations cannot legislate, set regulatory policy, decide issues of standing or provide judicial remedies. The activities regulated by PURPA all involve exercises of sovereign state governmental power. Congress, in enacting PURPA, has ignored this funda-

---

11. And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of broad rights accorded the nation under the Commerce Clause, it is equally true that if there is any attribute of sovereignty left to the states it is their right to pass, or not to pass, laws. *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *vacated and remanded sub nom., EPA v. Brown*, 431 U.S. 99 (1977), *citing In re Duncan*, 139 U.S. 449 (1891).

mental tenet of federalism and has unquestionably addressed attributes of state sovereignty. Thus, the second prerequisite of the *Virginia Surface Mining* test is satisfied.

C.

Compliance by Mississippi With PURPA Would Directly Impair Mississippi's Ability to Structure Integral Operations in Areas of Traditional Functions

As a third requirement that must be satisfied if a Tenth Amendment challenge to federal legislation is to succeed, "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Virginia Surface Mining*, 101 S. Ct. at 2366, *quoting National League of Cities*, *supra*, 426 U.S. at 852.

1.

Public utility regulation is an integral operation in the area of the traditional functions performed by the State of Mississippi

Neither *National League of Cities* nor *Virginia Surface Mining* gave ironclad definitions of the terms "integral operation" or "traditional functions." *National League of Cities*, however, cited "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples of such integral governmental functions protected by the Tenth Amendment. 426 U.S. at 851. The Court cautioned that those examples were not intended to be an "exhaustive catalogue" of traditional state government operations. 426 U.S. at 851 n. 16.

Since *National League of Cities*, other courts have added to this Court's list of integral governmental functions. *See, e.g., Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981) (education); *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) (operation of a municipal

airport); *NLRB v. Highview, Inc.*, 590 F.2d 174 (5th Cir. 1979) (health care for the aged and sick); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978) (licensing of drivers); *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977) (state legislature's adoption of rules for internal procedures); *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981) (game and fish law enforcement); *Alewine v. City Council of Augusta*, 505 F. Supp. 880 (S.D. Ga. 1981) (city bus service).

Although the Court used the word "traditional" to describe the state governmental functions protected by the Tenth Amendment, the number of years the state has been engaged in such activity and practice has played little, if any, part in determining whether an activity is an integral, traditional function of state government. *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979); *see also Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980), *quoting with approval New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Addington v. Texas*, 441 U.S. 418, 431 (1979) ("The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."); *Munn v. Illinois*, 94 U.S. 113, 133 (1877). The courts, instead, look to see that the activity is "typical of [the governmental activities] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *National League of Cities*, 426 U.S. at 851.

Several approaches have been suggested for distinguishing between integral, traditional governmental functions protected by the Tenth Amendment and nonprotective functions. In *Fry v. United States*, 421 U.S. 542 (1975), the precursor of *National League of Cities*, Mr. Justice Rehnquist suggested that the "traditional distinction between 'governmental' and 'proprietary' activities might in some form prove useful in such line drawing [between protected and nonprotected functions]." 421 U.S. at 558 n. 2 (Rehnquist, J., dissenting).

In the wake of *National League of Cities*, the United States Court of Appeals for the Sixth Circuit, in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), has enumerated four criteria that should be present before state activity may be considered a traditional or integral governmental function according to that court's reading of *National League of Cities*:

> Among these elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or to perform the activity because of a community-wide need for the service or activity.

598 F.2d at 1037.

The United States Court of Appeals for the Second Circuit has developed a streamline version of the *Amersbach* test. In *United Transportation Union v. Long Island Rail Road Co.*, 634 F.2d 19 (2d Cir. 1980), the court held that a governmental activity must meet two criteria in order to be a function protected by the Tenth Amendment.

> First, it [must be] a service that the state and the local governments are particularly suited to provide because of the community-wide need—and it [must be] a service [the local government] have come to provide by a process of economic elimination of private suppliers.

634 F.2d at 27.

Plainly, public utility regulation as conducted by the Mississippi Public Service Commission meets any of the

foregoing concepts of what constitutes an integral or traditional state function.

2.

PURPA impairs the state's ability to structure its operations in the area of public utility regulation

Virginia Surface Mining never reached the third requirement of *National League of Cities*, so *Virginia Surface Mining* offers no new guidance in that regard. *National League of Cities*, however, is unmistakable in its pronouncement that federal legislation is not within the authority of the Commerce Clause insofar as it acts "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." *National League of Cities*, 426 U.S. at 852. Even the Appellants admit that PURPA "obligates the states to perform certain regulatory functions . . . ." Brief for the Appellants at 35. This pressing of state governmental machinery into the federal service is without precedent. "We are aware of no such decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist." *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1975), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

PURPA displaces the state's freedom to structure the activities of its regulatory authority in at least three ways.

a. First, PURPA intrudes into the policy-making area of utility regulation by requiring the state regulatory authority to consider federally-created ratemaking standards and to determine whether those standards should be chosen over the standards presently employed by the

states. 16 U.S.C. §§ 2622-2623 (Supp. III 1979); 15 U.S.C. § 3203 (Supp. III 1979). The states are required to adopt the federally established standards if the standards are appropriate to carry out the purposes of the Act. *Id.* Although Appellants contend that the Act leaves the states free to choose whether or not to adopt or implement the federally establishcd standards, Brief for the Appellants at 36, a closer reading of PURPA reveals that such is not the case. PURPA section 115 establishes "Special Rules for Standards," which define what shall be "appropriate" for purposes of consideration of the standards established by sections 111 and 113. 16 U.S.C. § 2625 (Supp. III 1979); *see also* 15 U.S.C. § 3204 (Supp. III 1979) ("special rules" for standards established by PURPA Title III).

The requirements of the Act are desiged to inevitably lead to the adoption of the PURPA standards. If a state regulatory authority somehow avoids the adoption of the standards, PURPA requires it to justify its failure to adopt the standards in writing to the federal government. 16 U.S.C. § 2621(c)(2) and § 2623(c)(2) (Supp. III 1979).

PURPA would further influence state regulatory policy by conferring the right to initiate, participate or intervene in state regulatory proceedings upon the Secretary of Energy, affected utilities and consumers of affected utilities. 16 U.S.C. § 2631 (Supp. III 1979). PURPA confers standing and the right of appeal in state court upon the Secretary of Energy or any other person who participated in the regulatory proceeding. 16 U.S.C. § 2633(c) (Supp. III 1979). Persons initiating, intervening or otherwise participating in regulatory proceedings pursuant to PURPA would not be limited to the federally established standards of PURPA in what they could require of the state regulatory authority. PURPA authorizes such participants to

raise "other concepts which contribute to achievement of the purposes of this title." 16 U.S.C. § 2631(a) (Supp. III 1979). Congress intended the phrase "other concepts" to "be construed broadly." Conference Report at 82, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7816.

This prospect of an unlimited number of intervenors presenting an unlimited number of regulatory "concepts" to the regulatory authority confronts the regulatory authority with a potentially devastating problem. The potential for delay alone poses a very real threat to the Mississippi Public Service Commission, since it is required to complete any determination of rates within six months of the filing by a utility of a notice of rate change. Miss. Code Ann. § 77-3-39 (Supp. 1980). PURPA's potential for disruption of the regulatory process is limited only by the intervenor's imagination.[12]

PURPA further invades the policy-making function of the state regulatory authority by purporting to expand the discretion of the regulatory authority in its ratemaking function. It is well established that a state regulatory authority has only such powers and duties as have been

---

12. The mere threat of intervention and appeal could have a chilling effect on the exercise of state prerogative. As Senator Durkin noted in the debate on PURPA, if "we give them the right to appeal, we give them a blackjack. We will give them a hammer to coerce every utility regulatory commissioner in the country . . . I think it is a serious mistake. I think it goes too far." In a like vein, Senator Domeneci stated that "if the federal government . . . has this added option of going into the courts of the state or the Federal System to appeal a ruling adverse to its position we might just as well today have adopted the approach that the Federal Government shall preempt ratemaking across this land, for that is basically the effect. And it is even worse because it is done under vague guidelines that were intended as goals because the committee did not even know whether, in many instances, those would be good for the consumers or bad for the consumers in respective states." 123 Cong. Rec. 32662 (1977) (remarks of Senators Durkin and Domeneci).

delegated to it by the state legislature.[13] *United Gas Pipeline Co. v. Mississippi Public Service Comm'n*, 241 Miss. 762, 774, 133 So.2d 521, 524 (1961). Despite this obvious principle of law, Congress has unmistakably stated that one of the intended purposes of PURPA is to expand the discretion of the state regulatory authorities. Conference Report at 71, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7805.

b. Secondly, PURPA impairs the state's ability to structure its operations in the area of utility regulation by appropriating the state regulatory machinery for the purpose of implementing federal policy. PURPA Title II, section 210, for example, provides that the state regulatory authorities shall implement federally promulgated rules for each electric utility over which they have ratemaking power. 16 U.S.C. § 824a-3 (Supp. III 1979). The Committee of Conference made it quite clear in its report just what the intention of Congress was in passing section 210:

> [T]his Section requires that States and utilities follow rules which the Federal Energy Regulatory Commission is to prescribe within one year after the date of enactment of this legislation.

Conference Report at 97, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7831.

The Federal Energy Regulatory Commission is given express power to enforce section 210 against state regulatory authorities. 16 U.S.C. § 824a-3(h)(2)(a) (Supp. III 1979). State regulatory authorities in violation of this

---

13. In at least one instance PURPA requires the states to consider a regulatory policy which is illegal in a number of states. Section 114 of PURPA requires the states to consider establishing a "lifeline rate," that is, a rate for essential electrical needs which is lower than the actual cost of providing the electrical services required. 16 U.S.C. § 2624 (Supp. III 1979). In a substantial number of states such rates are considered discriminatory and illegal. See Amicus Curiae Brief of Mountain States Legal Foundation at 8 n. 6.

federal policy could find themselves subject to injunctions, mandamus proceedings, forfeitures or fines, and even jail sentences. 16 U.S.C. §§ 825m(a)-(b); §§ 825n-o (1976).

Furthermore, any failure to comply with any of the mandates of either Title I or Title III of PURPA may subject the Mississippi Public Service Commission to a writ of mandamus sought by the Secretary of Energy.[14]

Congress also has decreed that the states shall report annually "to the Secretary, in such manner as the Secretary shall prescribe, respecting its consideration of the standards established by sections 111(d) and 113(b)."[15] 16 U.S.C. § 2626 (Supp. III 1979). These annual reports are not without congressional purpose. As stated by DOE Administrator David J. Bardin:

> A key component of the PURPA approach to modernizing utility regulatory policy is the notion of State Accountability, pursuant to sections 116 and 309. Through the vehicle of annual State and DOE reports, Congress expressly intends to oversee the progress of the states and, where necessary to consider additional legislation.

Hearings on Oversight Pertaining to the Implementation of the Public Utility Regulatory Policies Act of 1978, with Particular Reference to Titles I and III, before the House Subcom. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, ser. 96-61, 96th Cong., 1st Sess. 533 (June 18-19, 1974).

---

14. Section 123(c)(1), 16 U.S.C. § 2633(c)(1) (Supp. III 1979); Conference Report at 84, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7818.

15. Despite Appellants' contention that there is no penalty for failure to meet Title I deadline, Brief for the Appellants at 6, the State of Mississippi has already been threatened by the Department of Energy for failure to report regarding the requirements of sections 111 and 113. See Affidavit of C. Keith Howle, J.A. at 64.

This idea of state accountability, however fashionable, is totally inconsistent with the concept of federalism established by the Constitution. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). Moreover, the state reporting requirement is practically, as well as theoretically, infirm. The reporting requirements have proved to be so burdensome to the states, the federal government and the private sector, that the General Accounting Office has recommended the repeal of section 116. The Comptroller General, U. S. General Accounting Office, *Burdensome and Unnecessary Reporting Requirements of the Public Utility Regulatory Policies Act Need to be Changed*, EMD-81-105 (Sept. 14, 1981), p. 20.

c. Finally, the cost of implementing PURPA would place an oppressive burden on the Mississippi Public Service Commission. Keith Howle, Director of Utilities for the Mississippi Public Service Commission since August, 1968, has estimated that implementing PURPA would cost the Mississippi Public Service Commission over two million dollars during the next ten years. Affidavit of C. Keith Howle, J.A. at 60. The annual budget of the Mississippi Public Service Commission would have to be increased by approximately $200,000 in order to comply with PURPA's provisions. *Id.* According to Mr. Howle, the cost of submitting a proposal alone to the Department of Energy regarding PURPA would exceed $360,000. *Id.* The Mississippi Public Service Commission, already working to capacity, in order to meet the requirements of PURPA would require an increase of at least five executive employees and three secretaries. *Id.* This additional strain on the Commission's budget would necessitate curtailment of the Commission's functions in some other area of operation. *Id.* Although it is true that "a measurable impact" on a state's economy, "standing alone, is insufficient to establish a Tenth Amendment violation, *Virginia Surface Mining*, 101 S. Ct. at 2368 n. 33, such an impact has in the

past been given as a grounds for concern when federal legislation collides with local interests. *National League of Cities*, 426 U.S. at 846-47, 853. Certainly, economic impact serves to illustrate that the intrusion upon the state's domain is a factual as well as a theoretical violation of the state's right to structure its integral, traditional functions.

Appellants have attempted to whitewash the Act's financial burden upon the states by pointing to Section 141 of PURPA, 42 U.S.C. §§ 6807-08, which provides for federal grants to aid the states in carrying out Titles I and III, and Section 210 of PURPA. Brief for the Appellants at 36 n. 41. To suggest that Congress may buy out the states without their consent does violence to our basic concepts of federalism. Our system does not exist merely at the sufferance of Congress. *See Virginia Surface Mining*, 101 S. Ct. at 2389 (Rehnquist, J., concurring). Moreover, the funds appropriated by section 141 appear to be in jeopardy, and there is no guaranty that the funds will continue to be available. The Comptroller General, U. S. General Accounting Office, *Burdensome and Unnecessary Reporting Requirements of the Public Utility Regulatory Policies Act Need to be Changed*, EMD-81-105 (Sept. 14, 1981) p. 6.

In *Virginia Surface Mining*, the Court dismissed claims that the SMCRA there at issue violated the Tenth Amendment, noting that the SMCRA was directed at private individuals and businesses, not states. The Court also cited as a saving grace of the SMCRA that the states were not compelled to enforce the standards established by the Act, "to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Virginia Surface Mining*, 101 S. Ct. at 2366. Manifestly, those distinctions do not exist in the present case. PURPA's provisions are directed at the states as well as private business. PURPA also causes a burdensome economic impact upon the state regulatory authorities which

was not felt by the affected states in *Virginia Surface Mining*. Surely a more blatant example of compelling the states to administer the details of a federal regulatory scheme has never been passed by Congress.

3.

There is no federal interest sufficient to justify PURPA's intrusion into the domain of the states

In *Virginia Surface Mining*, 101 S. Ct. at 2366 n. 29, the Court noted that there are certain situations where "the nature of the federal interest advanced may be such that it justifies State submission even if the state demonstrates the three requirements establishing a valid Tenth Amendment claim. Such situations are governed by the principles stated in *Fry v. United States*, 421 U.S. 542 (1975), and reaffirmed in *National League of Cities*, 426 U.S. at 852-53.

An application of these principles to PURPA reveals that this case does not present the requisite extraordinary circumstances to justify federal intrusion. In *Fry*, the Court upheld the Economic Stablization Act, a "temporary enactmen[t] tailored to combat a national emergency." *National League of Cities*, 426 U.S. at 853. The enactment was "an emergency measure to counter severe inflation that threatened the national economy." *Fry*, 421 U.S. at 548.

Under the principles of the cases cited by the Court in *Virginia Surface Mining*, our federalism tolerates a limited federal intrusion under extraordinary circumstances only if (1) the federal enactment is occasioned by an extremely serious problem endangering the well-being of all the component parts of our federal system and is tailored to combat the emergency, (2) the collective action of the federal government is needed to forestall the emergency, (3) there is no displacement of state choices as to how governmental

operations should be structured, (4) the federal action does not increase pressures on state budgets, and (5) the enactment is carefully drafted so as not to interfere with the states' freedom beyond a very limited specific period of time. *National League of Cities*, 426 U.S. at 853.

The invalidity of PURPA is glaringly apparent under an application of these prerequisites. The provisions of PURPA are clearly not designed to allay an extremely serious problem since the justification for the blatant federal intrusion is merely to allow the federal government to become a more effective "advocate" in state proceedings and to give the federal government the ability "to monitor and assess the ratemaking activities of the States." S. Rep. No. 95-442, 95th Cong., 1st Sess. at 9-10 (1977).

Moreover, how is PURPA designed as an emergency collective action of the federal government to forestall a national emergency when the Department of Energy's own estimates are unable to state that PURPA will create energy conservation savings of even one barrel of oil?[16] The Department of Energy has estimated that PURPA will cause energy savings of only zero to 160,000 barrels of oil per day by 1985.

Obviously a zero savings of oil will not forestall any national energy problem. What is surprising, however, is that by the most optimistic estimates, PURPA's savings of oil would be only slight by DOE's own standards. For example, in *Independent Gasoline Marketers, Inc. v. Duncan*, 492 F. Supp. at 617 n. 4 & 618, the Secretary of Energy acknowledged that a savings of 56,000 to 100,000 barrels of oil per day would admittedly be "slight."

---

16. This is, of course, contrasted with the very substantial energy savings projected for other energy conservation statutes enacted the same time as PURPA. *See, e.g.*, Powerplant and Industrial Fuel Use Act of 1978 and National Energy Conservation Policy Act (providing role for states by various conservation programs) at note 1 *supra*.

Additionally, an idea of how likely Congress considers that even a 160,000 barrels-per-day savings will "forestall" our "extremely serious problem" of dependence on foreign oil may be had from the action Congress took in cutting a total of 270,000 barrels per day of oil savings out of the Powerplant and Industrial Fuel Use Act of 1978. In noting that "[t]hese modifications will have the effect of *slightly* reducing the oil and gas savings," Congress made exclusions, interestingly enough, including a 160,000 barrel-per-day savings cut in the utility sector in the simple interest of "flexibility."

> In the utility sector . . . [T]his provision (for exemptions to burn oil) might reduce the *oil and gas savings of S. 977 by as much as 160,000 barrels of oil per day in 1985 . . . in the interest of allowing utilities some flexibility in meeting their required reliability of service.*

S. Rep. No. 95-361, 95th Cong., 2d Sess. 35, *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173, 8180.

Ironically, while Appellants have created a mountain of federal regulatory burdens for the states, arguing that PURPA is designed to collectively respond to a national emergency, Congress, at the same time PURPA was enacted, made a 270,000 barrel-per-day cut in oil savings in the mere interest of providing the utilities some regulatory "flexibility."

Likewise, how are the cogeneration and small power production provisions of PURPA designed to forestall a national emergency when the Appellants note that Congress expects the provisions to save only 20,000 barrels of oil per day by 1987? Brief for Appellants at 22.

Furthermore, what is the likelihood that Appellants consider PURPA vital to our nation's goal of "forestalling" the "extremely serious problem" of dependence on foreign

oil, when Appellants do not even list PURPA as a contribution to "State and Local Conservation Programs" to decrease oil consumption in their 1980 "Annual Report to Congress." Instead, Appellants emphasize the plethora of other major conservation programs for state conservation efforts provided under the Energy Policy and Conservation Act of 1975; the Energy Conservation and Production Act of 1976; and the National Energy Conservation Policy Act enacted the same year as PURPA. *See* "Secretary's Annual Report to Congress - January 1980" at 2-8 to 2-10.

Indeed, the only discussion provided in the Secretary's Annual Report regarding PURPA falls under the Secretary's explanation of his various federal regulatory initiatives and the regulatory directives ordered thereunder. *See* Chapter 12 of Secretary's Annual Report entitled "Economic Regulation," at 12-4.

Additionally, PURPA clearly does not represent a temporary enactment designed to combat a national emergency since Congress did not provide a termination date. Moreover, PURPA does not represent the type of *temporary emergency* enactment referred to in *Fry* and *National League of Cities*, since the enactment is totally devoid of any immediacy in its response to the goal of creating energy conservation and alternate fuel utilization. For example, the ratemaking reporting requirements of PURPA cover a period of ten years, and, for example, the energy sources addressed under section 210 will be years in making significant energy contributions.[17] PURPA does not represent a temporary program designed to assert immediate emergency measures to forestall an emergency. There is ample time to design such long-range

17. Renewable energy sources are expected to make only small energy contributions to the U. S. energy supply by 1990, *e.g.* OIL & GAS J. 48 (Oct. 12, 1981).

federal programs in a manner respecting our federal system of government.[18]

Finally, in applying the remaining two principles of *Fry* and *National League of Cities*, we note that PURPA increases pressure upon state budgets since the cost of even submitting a compliance proposal to DOE exceeds $360,000. This exceeds the annual budget of the Mississippi Public Service Commission by more than one-half. Likewise, the Act displaces state policy choices for the reasons previously set out herein.

Accordingly, there can be no doubt that PURPA plainly fails to meet the emergency criteria set out under *Fry* and *National League of Cities*. Indeed, the Act merely represents an unnecessary intrusion upon the sovereign functions of state governments. In closing, it is significant to note that while there are several other federal energy conservation programs providing roles for the states in our nation's quest to cut dependence on foreign oil, all of the other enactments, including the *Emergency* Energy Conservation Act of 1979, respect the sovereignty of state governmental functions by "inviting" rather than "commandeering" state participation.

---

18. Strict adherence to the constitutional limitations delineated in *Virginia Surface Mining* is likewise consistent with the strict approach taken by the Temporary Emergency Court of Appeals in reviewing energy cases wherein an emergency basis for an energy action is asserted by the government. *See, e.g., Mobil Oil Corp. v. DOE*, 610 F.2d 796, 803 (TECA 1979), *cert denied*, 446 U.S. 937 (1980) ("The only justification by the agency . . . appears to be that an emergency existed." Further finding, however, that "[i]t is axiomatic that a mere recital of good cause does not create good cause."); *Standard Oil v. DOE*, 596 F.2d 1029 (TECA 1978); *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA 1975) (in denying a Fifth Amendment challenge to an emergency energy regulation TECA noted that "whether the challenged regulation would pass muster as a long-continuing response to chronic energy problems" was not before the Court.)

D.

PURPA Offends Basic Concepts of Federalism

This Court has expressed its concern for the sovereignty of the states in our federal system in a variety of ways,[19] and these concerns have recently become much louder and more frequent.[20]

There can be no justification for any Act under our federal system of government when an Act such as PURPA imposes its commands on the most sovereign attributes of a state—its power to govern. Not only does PURPA direct and command the State of Mississippi through its Public Service Commission to take specific affirmative action, the Act brazenly purports to "supplement otherwise applicable state law"[21] and under certain circumstances overrides state law when necessary to accomplish its purposes.[22] Failure to comply will subject the Mississippi Public Service Commission to compulsion through writs of mandamus and possibly other judicial remedies,[23] and in some cases to civil and criminal penalties.[24]

---

19. *See Younger v. Harris*, 401 U.S. 37, 44 (1971), and Mr. Justice Black's description of the proper relationship of the federal government and the states which he so eloquently characterized as "Our Federalism."

20. *E.g., Moore v. Sims*, 442 U.S. 415 (1979); *Massachusetts v. United States*, 435 U.S. 444 (1978); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974); *Samuels v. Mackell*, 401 U.S. 66 (1971).

21. 16 U.S.C. §§ 2621 and 2623; 15 U.S.C. § 3203 (Supp. III 1979); Conference Report at 70-71; *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7805.

22. Conference Report at 71, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797, 7805.

23. Section 123(c)(1), 16 U.S.C. § 2633(c)(1) (Supp. III 1979); Conference Report at 84; *reprinted in* [1978] U.S. Code Cong. & Ad. News 7797.

24. 16 U.S.C. § 825m(a)-(b) and § 825n-o (1976).

Surely the power to govern is a traditional state function. If the power of a state to decide whether to initiate policy or not, to adjudicate, to legislate, are not deserving of the protection of our Constitution under our federal system of government, the State of Mississippi and its Public Service Commission respectfully submit that nothing can be. Indeed, PURPA is a direct threat to this state's "separate and independent existence." *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911), *quoting Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868). The national government must not be allowed to "devour the essentials of state sovereignty . . . ." *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

It cannot be denied that PURPA embodies all three of the *Virginia Surface Mining* requirements. It regulates the states as states, it touches upon attributes of state sovereignty, and it impairs the ability of the state to structure its integral operations in areas of traditional functions. Moreover, there is no collateral justification for passage of PURPA by Congress since there is no emergency or other overriding federal interest. In the light of *National League of Cities* and *Virginia Surface Mining*, PURPA is clearly unconstitutional as a violation of the Tenth Amendment.

It is cause for concern that Congress would pass a law so contemptuous of the roles of the states in our federal system. But what is even more disturbing than PURPA is the trend it represents: the sacrifice of time-tested constitutional principles for what a transient congressional majority views as an expedient way to accomplish what it perceives to be a desirable end. The Brief for Appellants, as well as a number of amicus briefs filed in support of Appellants, is replete with citations attesting to the supposed good that will be accomplished by PURPA, ranging from energy conservation to rate reform. Appellants' litany of supposedly good deeds that will be wrought by

PURPA, however, is totally irrelevant to the question before the Court: whether the provisions of PURPA violate the powers reserved to the states under basic principles of federalism by the Tenth Amendment. Appellees have demonstrated in this Brief that PURPA is constitutionally invalid under the tests set forth in *National League of Cities* and *Virginia Surface Mining*.

II.

PURPA Is an Invalid Exercise of Congressional Authority Under the Commerce Clause Since It Does Not Regulate "Commerce"

An examination of what has been delineated as regulation of interstate "commerce"[25] under the well-established precedents of this Court plainly reveals that PURPA is not a valid exercise of congressional authority under the Commerce Clause.

While judicial review of legislation to determine whether Congress has appropriately exercised its commerce power has been influenced by ". . . the fact that the Commerce Clause is a grant of plenary authority to Congress,"[26] this Court has repeatedly acknowledged that the power is bounded by the limits "prescribed in the Constitution" since the time that Chief Justice John Marshall first championed the commerce power in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). *E.g., Virginia Surface Mining*, 101 S. Ct. at 2360. It is axiomatic therefore that "regulations that this Court can say are not reg-

---

25. "The subject matter of federal power is still 'commerce' and not all commerce but commerce with foreign nations and among the several States." *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938).

26. *Virginia Surface Mining*, 101 S. Ct. at 2360 citing *National League of Cities v. Usery*, 426 U.S. at 840; *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

ulations of 'commerce' cannot stand. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938)." *National League of Cities*, 426 U.S. at 860 (Brennan, J., dissenting).

A review of the "activities actually regulated"[27] by PURPA clearly indicates that the Act is on its face unconstitutional as it does not regulate "commerce." Instead of preempting state law by regulating "individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside",[28] or "allowing" the states to continue to regulate private activities affecting interstate commerce according to federal procedures, PURPA directs the unconsenting states to regulate in accordance with federal procedures.[29]

In recognizing PURPA's defective design the district court properly held the Act to be beyond the bounds of authority granted Congress under the Commerce Clause:

> Mr. Justice Sutherland held that Congress had no power or authority to regulate anything which is not commerce and, significantly, that the Congress had no power to do anything about commerce which is not regulation. He held at page 867 of the *Carter v. Carter Coal Co., supra*, that "Congress is powerless to regulate anything which is not commerce, as it is powerless

---

27. *Virginia Surface Mining*, 101 S. Ct. at 2367.

28. *Virginia Surface Mining*, 101 S. Ct. at 2369, *quoting National League of Cities*, 426 U.S. at 845.

29. In this respect PURPA is entirely different from other federal statutes which have survived constitutional challenges. *See Virginia Surface Mining*, 101 S. Ct. at 2366, n. 30 (Airborne Hunting Act, 16 U.S.C. § 742j-1; Clean Air Act, 42 U.S.C. § 7401 *et seq.* (Supp. III 1979); Clean Water Act, 33 U.S.C. § 1251 *et seq.* (Supp. III 1979).

Moreover, the Act is entirely different in this respect from all other federal energy conservation statutes which involve the states in federal programs to combat dependency on foreign oil. These statutes, including the "*Emergency* Energy Conservation Act of 1969", (emphasis supplied), "invite" state participation in the federal energy conservation programs, as opposed to PURPA's program which "commandeers" state participation.

to do anything about commerce which is not regulation."[30]

. . .

This Act simply does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution. . . .

J.S. App. at 4a & 7a.

To wield federal power in the manner encompassed in PURPA is likewise inconsistent with other authorities recently cited by this Court in *Virginia Surface Mining*.[31] For example, the Ninth Circuit in *Brown v. EPA*, 521 F.2d at 839 (emphasis in original), distinguished "governance of commerce" by the states from "commerce" activities which are appropriately regulated by Congress under the Commerce power. The court found:

> The *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce Clause*. Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the states is commerce. . . .

---

30. *Carter v. Carter Coal Co.*, 298 U.S. at 238.

31. The Court found that the enactment there did not "commandeer" the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. 101 S. Ct. at 2366, *citing Maryland v. EPA*, 530 F.2d 215, 224-28 (4th Cir. 1977), *vacated and remanded, sub nom., EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 990-94 (D.C. Cir. 1975), *vacated and remanded sub nom., EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827, 837-42 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977).

> To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent . . . an abrupt departure from previous constitutional practice. . . . To make *governance* of commerce indistinguishable from *commerce* . . . would reduce the states to puppets of a ventriloquist Congress. . . .

See also District of Columbia v. Train, 521 F.2d at 992 ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.")

Aside from the fact that PURPA is patently unconstitutional on its face, by regulating the state governance or regulation of commerce instead of activities[32] which affect interstate commerce, an anlysis of PURPA under the standards which the Court has applied to determine whether a regulated activity is an activity so substantially affecting interstate commerce that federal regulation is justified also demonstrates that PURPA is unconstitutional.

While the test for determining whether a regulated activity is one which "substantially affects" interstate commerce to the extent that the activity may be regulated by the federal government under the Commerce Clause is often simply stated as a determination of whether there is

---

32. Appellees note that activity of a state which is not a governmental activity may be subject to regulation under the Commerce Clause:

> The holding of *United States v. California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U.S. at 182.

National League of Cities, 426 U.S. at 854 n. 18.

a "rational basis for a congressional finding that the regulated activity affects interstate commerce," or "whether there is a reasonable connection between the regulatory means selected and the asserted ends", it is important to note the well-established standards by which such a test is governed. Without such standards this "relatively narrow"[33] test is meaningless.

At the outset, any determination as to whether an activity affects interstate commerce to the extent that it may be appropriately regulated under the Commerce Clause is necessarily governed by the recognition that

> Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection."

Santa Cruz Fruit Packing Co., 303 U.S. at 467; *Carter v. Carter Coal Co.*, 298 U.S. at 327.

With this in mind then, the underlying task of the Court is to determine whether the regulated activity so "substantially" affects interstate commerce that federal intervention is justified to protect interstate commerce. It is not enough that an activity merely "affects" interstate commerce.[34] This Court has "consistently held that the regulated activity must have a substantial effect on interstate commerce." *Virginia Surface Mining*, 101 S. Ct. at 2391 (Rehnquist, J., concurring). *E.g.*, *Virginia Surface Mining*, *id.* at 2362 (held that there was a "rational basis for concluding that surface mining has substantial effects on interstate commerce."); *Heart of Atlanta Motel, Inc. v.*

---

33. *Virginia Surface Mining*, 101 S. Ct. at 2360.

34. *Virginia Surface Mining*, 101 S. Ct. at 2391 (Rehnquist, J., concurring) ("Nor is it sufficient that the person or activity reached have some nexus with interstate commerce.").

United States, 379 U.S. 241, 258 (1964) ("substantial and harmful effect on interstate commerce"); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (must exert "a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (to be regulated activities must have a "close and substantial relationship to interstate commerce").

Consistent with this requirement that there must be a "substantial effect" on interstate commerce to support a "rational basis" for Congress' exercise of its commerce power, the Court has emphasized that Congress may not "use a relatively trivial impact on commerce as an excuse for broad regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27 (1968); *overruled on other grounds, National League of Cities*, 426 U.S. at 852-55; *Virginia Surface Mining*, 101 S. Ct. at 2392 (Rehnquist, J., concurring).

One final principle governs a determination of whether a commerce power regulation is justified:

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. . . .

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 37.

Accordingly, an examination of PURPA in light of these principles reveals that PURPA is unconstitutional.

A review of the Congressional findings and legislative history to determine whether there is a "rational basis" or thus a "substantial" need for federal regulation of state public service commissions to protect interstate commerce

clearly establishes that PURPA is constitutionally invalid. While the Appellants argue that "in enacting PURPA, Congress found that the activities it sought to regulate affect interstate commerce," and that "the legislative record provides ample support for Congress' findings," Brief for Appellants at 18-19, it is important to note that Congress did *not* even make any findings regarding the "substantial effect" on interstate commerce of the regulated activity herein.[35] Instead, the findings and legislative history are focused on the need for energy conservation,[36] as though the regulated activity herein is the utility industry, and as though the Act contains preemption provisions for the government to regulate directly the utility industry.

While the Appellants cite various congressional reports attempting to support their statements suggesting that Congress made findings that there was a substantial need to regulate the state public service commissions, it is important to note that Appellants' statements[37] relate to to proposed findings of need which were not adopted by Congress. In fact, if there is any documentation regarding the need to regulate the regulated activity herein, it is a finding that the regulated activities herein do not "substantially affect" interstate commerce to the extent that federal regulation is warranted. Contrasted with the original report cited by Appellants suggesting a "strong need"[38]

---

35. In *Virginia Surface Mining* the Court found that the "regulated activity" was the surface mining industry as opposed to the state, since the enactment provided for federal preemption over state regulation of mining activities. The regulated activity herein is the state, as PURPA is plainly directed to the state, and the Act contains no preemption provisions.

36. See 16 U.S.C. § 2601 (Supp. III 1979) (the Congressional findings).

37. See Brief for Appellants at 21-22.

38. H.R. Rep. No. 95-496 (Pt. 4), 95th Cong. 1st Sess. 129-130, 132 (1977).

to regulate the States, the report for the legislation actually adopted provides a section on "Background and Need," which states that federal intervention is not really warranted. For example, contrary to the Appellants' citation to the report for the originally proposed legislation which suggested that the States lacked sufficient "expertise" in this area and that there was insufficient state consideration of more innovative rate standards, the report for the legislation ultimately adopted makes the following statement regarding need for federal intervention:

> . . . It was apparent to the committee that many State utility commissions are currently involved in innovative ratemaking and are working toward the goal of conservation of energy through rate reform. At present, the State regulatory agencies rather than the Federal Government, possess the expertise to conduct the detailed costing and demand studies required to implement rate structure revision. Moreover, the committee recognized that rate structures must reflect the individual needs and local peculiarities of each utilities' service area; an appropriate rate design for Hawaii will not be appropriate for Idaho, nor is there any national consensus as to the proper costing methodology to be used to set rates for the various utilities. Finally the committee felt that the potential uncertainty and delays accompanying Federal regulation threatened to have an adverse impact on the financial health of the utility industry which outweighed the projected savings in capital expenditures claimed by supporters of the administration's proposal.

S. Rep. No. 95-442, 95th Cong., 1st Sess. 9 (1977).

Signficantly, while the legislation ultimately adopted imposed federal responsibilities on the state officials and

supplemented state law and the procedures of the state regulatory authorities, there are no findings in the statute or in the congressional reports evidencing a substantial need to so regulate the state regulatory bodies. At best, the report simply states that Congress desires to impose the PURPA directives so that the federal government can "be an effective advocate for these national purposes and be able to monitor and assess the ratemaking activities of the states." *Id.* at 9-10.

When viewed in light of this Court's decisions requiring evidence of a substantial effect on interstate commerce if the desired federal regulations are not implemented, there can be no doubt that there is no "rational basis" for PURPA. Notably absent from the legislation is any finding asserting a substantial need to regulate state government, the regulated activity herein. Moreover, the Congressional reports provide no support evidencing a "substantial effect" on interstate commerce if the federal government is not allowed to impose the regulatory schemes created under PURPA.

In contrast to the exhaustive evidence present in *Virginia Surface Mining*, 101 S. Ct. 2361-62, documenting the substantial impact on interstate commerce if Congress were not allowed to regulate surface mining activities, there is no evidence here revealing a "substantial effect" on interstate commerce if Congress is not allowed to impose PURPA's regulatory provisions on the States.

Likewise, it is glaringly apparent that the means of regulation herein bear no reasonable connection to the asserted goals of PURPA. The Act's provisions bear little, if any, relationship to the broad goals set out in Congress' findings regarding the need for energy conservation and

alternate fuel sources. Even assuming that the procedures result in a savings of 160,000 barrels of oil a day, the most optimistic projection, Congress, as well as the courts and the Department of Energy itself, have recognized that such savings are "slight" at best. *See, e.g.*, S. Rep. No. 95-361, 95th Cong. 2d Sess. 35 (1978), *reprinted in 1978* U.S. Code Cong. & Ad. News 8180-8181; *Independent Gasoline Marketers Council v. Duncan*, 492 F. Supp. at 617 n. 4 & 618. Likewise, the projections of a 200,000-barrel savings per day through imposing the cogeneration requirement of Section 210 on the states are considered only "slight" in impact. *Id.* Indeed, Congress cut energy savings measures exceeding this amount in other pieces of legislation passed at the same time as PURPA in the mere interest of giving the utility industry some regulatory "flexibility." It is an understatement to suggest that the States deserve at least the same consideration. As emphasized by Mr. Justice Harlan in *Maryland v. Wirtz*, 392 U.S. at 197 n. 27, Congress may not "use a relative trivial impact on commerce as an excuse for broad general regulations of state or private activities."

Accordingly, PURPA is an invalid exercise of congressional authority under the Commerce Clause.

CONCLUSION

The judgment of the district court should be affirmed.

CERTIFICATE OF SERVICE

I, Alex A. Alston, Jr., one of the attorneys for Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27th day of October, 1981, I served copies of the foregoing Brief for Appellees State of Mississippi and Mississippi Public Service Commission on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelope, with postage prepaid, to each of the following persons:

1. Honorable Rex E. Lee, The Solicitor General, Department of Justice, Washington, D.C. 20530, and Honorable Carol E. Dinkins, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, and Honorable Louis F. Claiborne, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, and Honorable Elliott Schulder, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, and Kathryn A. Oberly, Esq. and Susan V. Cook, Esq., Attorneys, Department of Justice, Washington, D.C. 20530.

2. Charles A. Moore, Esq., General Counsel, Federal Energy Regulatory Commission, Washington, D.C. 20426 and Jerome M. Feit, Esq., Deputy Solicitor, Federal Energy Regulatory Commission, Washington, D.C. 20426 and Joanne Leveque, Esq., Attorney, Federal Energy Regulatory Commission, Washington, D.C. 20426.

3. Honorable James B. Edwards, Secretary of Energy, Department of Energy, Washington, D.C.

4. Joshua Green, Esq., P. O. Box 166, Jackson, Mississippi 39205; James K. Child, Esq., P. O. Box 651, Jackson, Mississippi 39205 and Allen R. Hirons, Esq., Suite 950, 1800 Century Boulevard N.E., Atlanta, Georgia 30345.

I further certify that all parties required to be served have been served.

ALEX A. ALSTON, JR.